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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 363

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

No. 428

MIDWEST TELEVISION, INC., WESTERN
TELECASTERS, INC., and JACK O. GROSS,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT SOUTHWESTERN CABLE CO.

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BRIEF FOR RESPONDENT SOUTHWESTERN CABLE CO.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction under the Communications Act of 1934 to regulate non-microwave community antenna television (CATV) systems.

2. If it has, whether it may enjoin—without an evidentiary hearing or oral argument and for an indefinite and prolonged period of time—the concededly lawful operations of respondent CATV systems pending the ultimate completion of an evidentiary hearing initiated to determine whether the Commission should impose upon the operations of these particular CATV systems "additional or different requirements" than those imposed by the Commission's regulations on CATV systems generally.

STATEMENT

In view of the somewhat incomplete Statement in Petitioners' briefs, it is believed desirable to supplement them with the following relevant facts.

Introduction

Unlike AM radio signals which tend to hug the ground, television signals travel in a straight line. Because of the curvature of the earth, therefore, their normal range for good reception is limited to the horizon, usually a distance of around 70 miles. Moreover, the nature of the television signal is such that it is effectively blocked when it encounters hills or certain man-made structures.

CATV first developed in localities where satisfactory television reception was not possible through the use of normal house top antennas, either because of the distance from transmitting stations or because mountainous terrain blocked the signals. The first commercial system was started about 1950.

Originally a CATV system consisted merely of an antenna erected on a hill top and connected by cable or wire to subscribing homes. Such systems are ordinarily described as "off-the-air" or "non-microwave" systems. There are some systems, however, which are too far from television stations to receive the signals directly. They, therefore, rely on point-to-point microwave transmission to relay the signals to them. A microwave transmitter utilizes a portion of the

spectrum and therefore requires a license from the Federal Communications Commission.

All the CATV systems in the instant case are non-microwave systems, and all the signals which they carry are received directly off the air from the television stations without additional use of the spectrum.

Commission's Positions on Its Authority To Regulate CATV

The history of the Federal Communications Commission's view of its authority over CATV systems is a chronicle of vacillation and contradiction. In 1959, approximately a decade after the advent of CATV operations, the Commission first considered the question and concluded that it was without such authority—whether the CATV systems were "off-the-air" or fed by microwave. *CATV and TV Repeater Services,* 26 F.C.C. 403 (1959). On April 23, 1965, the Commission reversed its position with respect to CATV fed by microwave and asserted jurisdiction over such systems. *First Report and Order,* 38 F.C.C. 683 (1965). On March 8, 1966, the Commission completely reversed its earlier position and asserted authority over non-microwave CATV systems also. *Second Report and Order,* 2 F.C.C. 2d 725 (1966) (App. 1,[1] *et. seq.*)

This, in brief, is the record of the Commission's view of its authority to regulate CATV. A more detailed statement of these successive positions and the bases relied upon by the Commission is set forth below.

When the Commission first considered the question in 1959, it expressly concluded that it had no power to regulate CATV systems. In reaching this conclusion it consi-

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[1] "App." refers to the printed appendix filed in this court under Rule 36(1). The brief filed by the petitioners in No. 363 is referred to as "Gov't Br." and the brief filed by the petitioners in No. 428 as "Midwest Br.". In addition, there are appended to this brief five appendices designated Appendix A through E and referred to herein as "App. A", etc.

dered, among other arguments, the contention that it derived such regulatory authority over microwave CATV systems and should exercise it because of

> . . . the impact upon a television broadcaster of grant of radio facilities to a communications common carrier, where the common carrier facilities will be used for the purpose of providing communications service to a community antenna system operating in competition with the broadcaster.

The Commission dismissed the contention as follows:

> In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any non-broadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against access to common carrier facilities by such enterprises as closed-circuit music and news services, closed-circuit theater television operators, and, possible, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. *The logical absurdity of such a position requires no elaboration.*

26 F.C.C. at 431-32 (emphasis added).

This view of the matter was not long-lived. In 1962 the Commission, on the basis of a protest initiated by a local television station, denied an application of a common carrier by radio for permission to construct a microwave radio communications system to be used to transmit television signals to CATV systems serving three towns in Wyoming. It concluded that grant of the application would not serve the public interest because it would result "in the demise of the local television station and the eventual loss of service" to certain residents of the area which would not be reached by CATV. However, the denial was issued without prejudice to refiling of the application if it could be shown that the CATV operation would not duplicate the programs

carried by the local television station and would also carry the signals of the local broadcasters. In reaching its conclusion, the Commission stated: "To the extent that this decision departs from our views in the Report and Order in Docket No. 12443, 26 F.C.C. 403 (released April 14, 1959), those views are modified." *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 465 (1962), *aff'd sub nom. Carter Mountain Transmission Corporation v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). Thus the Commission took the first step in effectuating a program—which it had earlier rejected as a "logical absurdity"—of protecting broadcasters against the economic competition of CATV.

The second step was to translate the action it had taken in *Carter Mountain* into general rules. This was done on April 23, 1965, when it released its *First Report and Order*, 38 F.C.C. 683 (1965). There the Commission also stated that it had:

> . . . determined as an initial matter that the Communications Act vests in this agency appropriate rule making authority over all CATV systems, including those which do not use microwave relay service (the so-called "off-the-air systems").

Id. at 684. However, at that time it limited its asserted authority to microwave CATV systems and deferred action with respect to off-the-air CATV systems. Further, it simultaneously issued a Notice of Inquiry and a Notice of Proposed Rule Making[2] in order to develop "an appropriate record" and to meet its "need for more definitive information." *Id.* at 685.

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[2] 1 F.C.C.2d 453 (1965). There was attached to the document a "Commission's Memorandum On Its Jurisdiction and Authority", which concluded that ". . . the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not." *Id.* at 478-82. This memorandum was also appended to the Second Report and Order and appears at App. 69.

In the *First Report and Order* the Commission articulated its "belief that CATV service should supplement, but not replace, off-the-air television service." *Id.* at 705. The Commission asserted that duplication of broadcast program material by CATV systems in a local market from distant sources dilutes such audiences and is not "a fair method of competition" or "consistent with CATV's appropriate role as a supplementary service." *Ibid.* In order "to create reasonably fair and open conditions for competition between CATV and broadcasting stations . . . [and] to ameliorate the adverse impact of CATV competition upon local stations," the Commission adopted rules requiring microwave CATV systems to carry the signals of local television broadcasters and imposed "reasonable carriage and non-duplication requirements." *Id.* at 703, 714.

The next step was the adoption of the *Second Report and Order* on March 4, 1966, 2 F.C.C. 2d 725 (1966) (App. 1 *et seq.*).[3] The Commission modified its earlier issued rules and made them applicable to all CATV systems—whether microwave or non-microwave.

In essence, the *Second Report and Order* and the rules adopted therein regulate and limit the operation of CATV systems in three major respects. First, the "Compulsory Carriage" rules provide that CATV systems are required to carry the signals of local and nearby television stations if requested. Second, the "Exclusivity" rules provide that a television station with a stronger signal over the CATV community may prevent the system from carrying on the same day those programs of another station with a weaker signal which duplicate its programs.[4] Third, the "Top 100 Market"

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[3]The Second Report and Order was modified in minor respects by Memorandum Opinions and Orders adopted on April 20, 1966, 3 F.C.C.2d 400 (1966), and January 5, 1967, FCC 67-34 (App. 111).

[4]The Commission rules governing television broadcast stations recognize three grades of signal strength – Principal City Grade, Grade A and Grade B. These grades are defined in terms of the level of

rules provide that in the markets so designated—and both Los Angeles and San Diego are so designated—CATV systems may not, without Commission authorization, carry the signals of television broadcast stations unless such stations place a signal of Grade B strength over the community serviced by the CATV system.[5]

The foregoing history spells out the sharp change between 1959 and 1965 in the Commission's view of its authority to regulate CATV. It should, however, be pointed out that during that period the Commission repeatedly sought, but Congress did not enact, authorizing legislation dealing specifically with CATV.[6]

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signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade – 90%; Grade A – 70%; Grade B – 50%.

[5]Section 74.1101, *et seq.* of the Commission's Regulations. 47 C.F.R. § 74.1101, *et seq.* (1967).

[6]The history of these attempts is set out in a footnote contained in the Notice of Inquiry and Notice of Proposed Rule Making, *supra* note 2, at 464, n.13:

> Following the Report and Order in Docket No. 12443, supra, the Commission recommended that the Congress amend the Communications Act to require CATV systems to obtain the consent of the stations whose signals they transmit, and to carry the signal of the local station (without degradation) upon request. These proposals were embodied in S. 1801 and H.R. 6748, introduced in the 86th Congress, including S. 2653 (providing for the licensing of CATV systems) and S. 2303 (providing for the issuance of certificates of convenience and necessity). The Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce held hearings on these bills, and several other bills which involved CATV systems, including S. 1739, S. 1741 and S. 1886. On September 8, 1959, the Committee on Interstate and Foreign Commerce reported favorably on S. 2653. S. Rept. 923, 86th Cong., 1st Sess. In 1960, following two days of debate on the floor of the Senate (106 Cong. Rec. 10326, 10344, 10407 and 10520), S. 2653 was recommitted to the Committee on Interstate and Foreign Commerce by one vote, 106 Cong. Rec. 10547. As a

The Proceedings Here Involved

The instant proceeding relates to carriage of Los Angeles signals by CATV systems in San Diego. The latter city is the Nation's 54th television market, with approximately 352,600 television homes. Yet it has only two VHF television stations[7] (i.e., stations operating on one of Channels 2 through 13), whereas Los Angeles, about 120 miles away, has seven; San Francisco-Oakland has four; and Seattle-Tacoma has four.[8]

In those circumstances CATV can, and to the extent that it has been permitted to do so, does afford to the residents of San Diego an essential service not limited to eliminating reception problems stemming from terrain, distance and weather. It also widens the choice of television programs, such as news, panel programs, documentaries, films, sports, etc., available to viewers in San Diego. CATV service therefore began to be supplied pursuant to franchises issued by the interested communities as early as December of 1963.[9]
early as December of 1963.[9]

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result, no legislation relating to CATV systems was enacted in the 86th Congress. In the 87th Congress, the Commission proposed S. 1044 and H.R. 6840, which would have expressly authorized the Commission to issue rules for the protection of stations providing locally-originated television programs. These bills received no action. The Commission proposed no legislation to the 88th Congress, and no action was taken on any bills.

[7] Midwest Television Inc., 11 P & F Radio Reg.2d 273, 276, 281 284 (1967). (Initial Decision of Hearing Examiner, dated September 28, 1967, hereinafter cited as *Initial Decision*.) As that decision indicates, one UHF station is also in operation in San Diego and both English and Spanish programs are received on VHF from nearby Tijuana, Mexico. *Id.* at 276.

[8] TV Digest, *Television Factbook* No. 37 (1967) at 72-b-79-b, 96-b-100-b, 758-b-760-b, 765-b.

[9] *Initial Decision* 281.

Southwestern Cable Co. (hereinafter "Southwestern"), like the other respondents in this proceeding, is a CATV system operating in the San Diego, California, area. It uses a high antenna to receive the signals of Los Angeles television stations "off-the-air" and transmits them to its subscribers by cable and wire. It began such service in December of 1965 pursuant to a franchise earlier issued by the City of San Diego for a portion of the city lying north of the San Diego River channel.[10]

It is explicitly conceded by Petitioners that Southwestern, as well as the other CATV respondents, operate in full compliance with all of the substantive rules and regulations adopted by the Commission in its *Second Report and Order*. Thus, in the proceedings below before the Ninth Circuit, the Commission conceded "that none of the petitioners [respondents here] is presently in violation of the governing statutes and the Commission's rules with respect to any of the matters dealt with in the described Commission Order." (App. 182) This case arose, however, under certain so-called "ad hoc procedures" which provide, in pertinent part, that upon petition of any interested person the Commission may waive any provision of its rules "relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements." 47 C.F.R. § 74.1109(a) (1967). Subsection (f) of that regulation further provides, in pertinent part, as follows:

> In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded

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[10] As noted above, pp. 3-6, at that time the Commission had not asserted authority over off-the-air CATV systems such as Southwestern's. It was not until March 8, 1966, with the release of the Second Report and Order, that the Commission asserted regulatory authority over off-the-air CATV systems of the type constructed and operated by Southwestern and the other respondents herein.

to any party pending the hearing and the nature of any such temporary relief . . . .

On March 17, 1966, almost immediately following the issuance of the *Second Report and Order,* Midwest Television Inc. (hereinafter "Midwest"), licensee of a VHF, CBS affiliated station in San Diego, filed a petition with the Commission contending among other things that the "distant", i.e., Los Angeles, signals imported to San Diego by the respondent CATV systems "will, if allowed to expand, fragment and drastically reduce the local stations' viewing audience . . . [and cause San Diego television stations] audience losses, eventually resulting in reduced advertising revenues and curtailed local and quality programming." (App. 150) It therefore requested "essentially, that the Commission issue a final order appropriately confining carriage of Los Angeles signals by respondents' systems and that, if a hearing is necessary, the respondents be ordered . . . [as a measure of] temporary relief pending the outcome of any hearing . . . [to] *cease and desist* . . . [from extending] delivery of the Los Angeles signals to subscribers located" beyond specifically defined geographical boundaries. (App. 147-48, 152, emphasis added)

The respondent CATV systems filed responsive pleadings and contended, *inter alia,* that Midwest had failed to show that the Los Angeles signals were carried by the CATV systems beyond their predicted Grade B contour[11] and that, in fact, the signals carried provided a Grade B signal to San Diego. As a consequence, respondents asserted that they were in compliance with the "Top 100 Market" rule, Section 74.1107(a) and that under the terms of the *Second Report* and the rules, no Commission authorization was required. Respondents contended further that, in any event, they were "grandfathered" under Section 74.1107(d) of the rules and were not extending service to new geographical areas within

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[11] As a consequence, there would be no violation of the Top 100 Market rule, Section 74.1107(a).

the meaning of the proviso limiting grandfather rights. (App. 152-57) The Commission concluded that a hearing was necessary, and on July 25, 1966, it issued a Memorandum Opinion and Order (which was corrected by an erratum issued July 26, 1966) designating the matter for hearing.[12] (App. 111)

With respect to the request for a temporary "cease and desist" order the CATV systems contended that the Commission was without authority to issue such a stay for the reasons that Section 312 of the Communications Act, 47 U.S.C. § 312 (1964), constitutes the only basis for any sort of interim action pending a hearing. Subsection (b) of Section 312 confers general power upon the Commission to issue cease and desist orders for the failure to operate as licensed or to observe the terms of the Act or of "any rule or regulation of the Commission authorized by this Act." However, issuance of the order must be preceded by an evidentiary hearing unless waived, 47 U.S.C. § 312(c) (1964), at which "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission." 47 U.S.C. § 312 (d) (1964). Respondents contended further that the Commission was without power, in any event, to issue a stay of CATV operations which were in full compliance with all rules and regulations adopted by the Commission in the exercise of its asserted authority to regulate CATV systems.

The Commission conceded *arguendo* that the respondent CATV systems were operating lawfully and in compliance with the rules.[13] It concluded, however, that the imposition

[12] The order set out specific issues to be covered in the proceeding relating to the present and potential percentage of CATV service in the San Diego market, the affect or potential affect on local television stations, whether or not the expansion of the respondent CATV systems should be permitted and what, if any, action should be taken by the Commission (App. 172-73).

[13] As noted above, the Commission later made the same concession as a factual matter and without reservation, i.e., not merely "arguendo". *Supra*, p. 9.

of a stay was nevertheless warranted. The authority asserted and relied upon by the Commission was that the temporary relief provisions of Section 74.1109(f) of its rules, 47 C.F.R. § 74.1109(f) (1967), constitutes a valid exercise of the authority conferred upon it by Section 4(i) of the Act, to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act as may be necessary to the execution of its functions." 47 U.S.C. § 154(i) (1964). It also referred to similar general regulatory provisions of the Act, Sections 303(f) and 303(r), 47 U.S.C. §§ 303(f), 303(r) (1964), as support for this general authority. (App. 162-66)

Further, the Commission expressly rejected the alternative proposed by respondents that the Commission petition the Court of Appeals for an injunction restraining CATV expansion in San Diego under the authority of *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). The Commission did not dispute that this course was available to it. The sole basis relied upon was the assertion that following such a course "would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission." (App. 177) Stressing the need to resolve "public interest considerations. . . . before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted" (App. 163), the Commission then concluded that "temporary relief is necessary and appropriate 'before the consequences *possibly adverse* to the public may develop.'" (App. 166, emphasis added) This is as far as the Commission went in finding a public necessity for its injunctive order.

On the foregoing premises, the Memorandum Opinion and Order, which was issued on the basis of the pleadings and affidavits only and without any other hearing or oral argument, ordered "temporary relief, pending final disposition of this proceeding" substantially as requested by Midwest.

(App. 170-71, 174) The order "for temporary relief" required the respondents to confine delivery of Los Angeles signals carried on their systems to subscribers within franchise areas in which they were actually operating on February 15, 1966, or to subscribers who had actually contracted for such service between February 15, 1966, and the date of the order. (App. 170-72)

Southwestern, as did the other CATV systems involved, sought review of the order in the Court of Appeals for the Ninth Circuit. That Court consolidated the actions and permitted Midwest and the other television broadcasting interests to intervene. Preliminarily, by orders dated August 8 and 10, 1966, the Court stayed those portions of the Commission's Memorandum Opinion and Order which limited and confined Petitioners' CATV operations. (See App. 181) Thereafter, by Interlocutory Injunction issued on August 23, 1966, the Ninth Circuit concluded that, as a consequence of these "temporary" restraints, Southwestern "in all probability will be unable to extricate itself from its present financial difficulties and may be forced to suspend all operations; and in any event will lose substantial and irretrievable gross income, thereby causing irreparable damage . . ."; and that irreparable damage would also be caused to the other respondents because of the loss of "substantial and irretrievable gross income . . . [and the need] to lay off a number of highly skilled workmen." Accordingly, it was ordered that the Commission's order for "temporary" relief be modified so as to permit the addition of new subscribers to CATV trunk and feeder lines actually in existence as of August 23, 1966, the date of the court's order of Interlocutory Injunction. (App. 180, 182)

On April 28, 1967, the court issued its opinion under review herein. It concluded that the Commission lacked the power to issue its order for "temporary relief" pending a hearing and, to that extent, set the order aside. (App. 144-46)

After 28 days of hearing the evidentiary proceeding designated by the Commission was concluded; and on October 3, 1967, the Initial Decision of the hearing examiner was released. In pertinent part the Initial Decision concluded:

> There is no evidence that CATV produced competition to date has had any effect whatsoever on the service offered the public by the San Diego television stations, or the ability of those stations to continue offering that service.
>
> . . . .
>
> It having been concluded that CATV expansion will have no material effect on the operation of San Diego's network affiliated VHF stations, and that its probable effect on the operation of prospective and proposed independent UHF stations is unproven, the evidence on this record furnishes no basis for the imposition of any restrictions on the present or future operation of CATV systems in the San Diego market.[14]

Therefore, subject to further review by the Commission, the Initial Decision ordered "that the limitations on the operations of respondent CATV systems imposed by earlier orders in this proceeding are removed."[15] By order released November 14, 1967, the Commission certified the matter (i.e., review of the Initial Decision) to itself for final decision.[16]

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[14] *Initial Decision* 303, 304. This decision was released by the Commission on October 3, 1967, and was transmitted to the Court by letter from the Acting Solicitor General dated October 4, 1967.

[15] *Id.* at 305.

[16] However, in his letter to the Court of October 4, 1967, the Acting Solicitor General advised that review of the Initial Decision by the Commission "is not likely to be concluded before the end of the current Term."

SUMMARY OF ARGUMENT

The regulations adopted by the Commission in its *Second Report and Order* deal in considerable detail with a wide variety of subjects such as the right of a CATV system to carry the signals of certain stations and its duty to black out the signals of other stations under certain circumstances. Other pending cases already challenge the Commission's authority to regulate CATV and various sections of the regulations, including challenges based on constitutional grounds. This case deals only with an order of the Commission which enjoined respondents' lawful CATV operations without a hearing. The single question presented is—Did the Commission have the power to issue that order? In holding that the Commission did not indeed have such power, the court below stated (App. 192):

> Our conclusion that the Commission lacked the power to issue the order in question required that the order be vacated and set aside. In light of our disposition of the case, we decline to express any opinion as to the other issues raised in this proceeding.

Accordingly, this case does not involve the validity of any of the Commission's substantive rules—"The Top 100 Market" rules or "Compulsory Carriage" rules or the "Exclusivity" rules. The validity of these substantive rules was not before the Court of Appeals for the Ninth Circuit and that court did not, of course, pass upon such matters. Therefore, even if it should be determined that the Commission does have the claimed authority to regulate non-microwave CATV, the nature and scope of such authority and the validity of the rules and regulations which the Commission has designed to effectuate such authority must await final decisions in the numerous other cases in which such matters have been raised and presented.

The basic and ultimate issue is the Commission's power to issue, without an evidentiary hearing or oral argument, an order for "temporary" relief restraining the activities of

the respondents for an indefinite period of time while it determines whether "permanent" restrictions of some unspecified nature should be imposed upon them—restrictions different from those imposed on CATV systems generally. And the issue thus posed must be answered in light of (1) the Commission's express concession that the restrained activities are wholly legal, and (2) an intervening decision, based for the first time on a trial of the facts, that the facts do not support the imposition of either "temporary" or "permanent" restraints. In view of the grounds upon which certiorari was sought and granted, however, we address ourselves first to the Commission's authority to regulate non-microwave CATV.

I

The structure of the regulatory scheme of the Communications Act is comparatively simple. Title I (General Provisions) comprises the purposes, application and definitions of the Act. The principal substantive provisions are contained in Titles II and III. Title II deals exclusively with common carriers; and Title III deals with radio.

The purpose, structure and provisions of the Act do not grant the Commission regulatory authority over CATV operations—a form of communication by wire. The Government concedes that CATV systems are not common carriers and does not contend they are engaged in radio communication. As a consequence, CATV does not fall within either of the two basic subject matters of regulation dealt with in the Act—radio and communication engaged in by common carriers.

References in Sections 1 and 2(a) of Title I of the Act to "interstate and foreign communication by wire and radio" constitute descriptions of the general subject matter dealt with in the Act. The grant of authority is expressly limited in Section 2(a) to "the provisions of this Act." Such pro-

visions are principally contained in Titles II and III and do not include wire communication conducted by non-common carriers.

The claimed power is directly contrary to the legislative history of the Act and to its long-standing administrative interpretation. Congress expressly excluded private wire communication systems from regulation under Title II, and it cannot be assumed that it, nevertheless, intended to confer such power in Sections 1 and 2(a). The Commission has never, until it asserted authority over CATV, undertaken to regulate wire communication engaged in by others than common carriers.

The Commission does not have authority to regulate the operations of network organizations and numerous other non-common carrier interstate communications activities. Although network operations have a far greater involvement with and impact upon broadcasting, the Commission has uniformly, repeatedly and explicitly disclaimed authority to regulate such operations. Its lack of jurisdiction over the CATV operations involved herein is clearly an *a fortiori* case.

The Act is devoid of any substantive or procedural standards for the regulation of non-common carrier wire communication. The claim to Commission authority over non-microwave CATVs is therefore premised on an assumed power to regulate such communication for the purpose of achieving such objectives, and by such means, as the Commission deems appropriate. The absence of standards for the regulation of non-common carrier wire communication supports the conclusion that such activity was not intended to be regulated by Congress; or that, if Congress did so intend, the delegation is unconstitutional.

The history of proposed CATV legislation in Congress discloses Congressional awareness and acquiescence in the Commission's original determination that it lacked authority to regulate CATV and that acqueiescence is entitled to great weight.

II

Assuming *arguendo* that the Commission has authority to regulate non-microwave CATV, it does not have authority to restrain lawful activity of the respondents which is conceded to comply with all rules and regulations promulgated by the Commission governing the operation of CATV systems; and to impose such restraints without evidentiary hearing or even oral argument and to continue such restraints in effect for an extended and indefinite period of time.

The claimed power to impose such restraints is a flat repudiation of due process and fair play and makes a mockery of the procedural requirements of the Administrative Procedure Act and the Federal Communications Act. Its basic premise is the validity of a "rule" (or more accurately an "anti-rule") which explicitly reserves for the Commission the claimed power to impose any and all restraints as it deems "appropriate" on any CATV system—and to do so upon such procedural terms as it chooses. Such a claim of unbridled authority must be held illegal.

Sections 4(i) and 303(r) of the Communication Act, upon which the Government relies for such implied authority, are enabling provisions only, designed to implement other substantive provisions of the Act. The legislative history of the sections makes it clear that they were conceived as narrow in scope and do not, in any event, confer authority to impose restraints of lawful activity of the type involved herein.

The power to issue a temporary restraining order claimed by the Commission is flatly repudiated by the provisions, standards and history of Section 312(b) of the Communications Act. Section 312(b) comprises the only source of injunctive power conferred on the Commission and authorizes it to issue cease and desist orders to restrain illegal activities only, in carefully circumscribed situations and upon precisely stated conditions which includes notice, specification of issues, and then only after an evidentiary hearing. The legislative history of Section 312(b) and of related enforce-

ment powers of the Commission clearly establish the care and selectivity which Congress has exercised in conferring such powers; and its failure to confer power requested by the Commission to issue temporary injunctions pending an evidentiary hearing even against alleged violators of the Act.

The authority claimed by the Commission is contrary to the uniform and consistent pattern of legislation governing executive departments and administrative agencies, which limits their injunctive and cease and desist powers by specific terms delineating precisely the criteria for the invocation of such power and the required procedures to be employed. Moreover, the injunctive power here exercised would not be exercised by courts. Accordingly, the power to enjoin here exercised is not conferred by Sections 4(i) and 303(r).

ARGUMENT

I

THE COMMUNICATIONS ACT OF 1934 CONFERS NO AUTHORITY ON THE COMMISSION TO REGULATE NON-MICROWAVE CATV SYSTEMS

The alleged basis of the Commission's jurisdiction to regulate non-microwave CATV[17] is "succinctly expressed" in the Government's brief (p. 29) as follows:

> CATV constitutes interstate communication by wire (47 U.S.C. 152(a), 153(e)) since the systems physically intercept and extend television signals. By so

[17] As the Commission has pointed out, there exists an "obvious distinction" between microwave and non-microwave CATV systems in "that nonmicrowave CATVs do not file applications for licenses with the Commission or use licensed facilities. . ." (App. 42) As a consequence, the legal problems relating to Commission authority over each of these forms of activity differ. Since all of the respondents are non-microwave systems, only Commission authority over non-microwave CATV systems is here involved. This is expressly recognized in the Government's statement of the first question presented. (Gov't Br. 2)

> doing, they directly affect and threaten to disrupt the allocation plan for off-the-air television service established by the Commission under the Act (47 U.S.C. 303(h) and (s), 307(b)). CATV is therefore subject to the Commission's general regulatory powers (47 U.S.C. 154(i), 303(f) and (r), 312(b)).

This argument is wholly dependent upon the assumption that CATV constitutes "interstate communication by wire" and therefore falls under the authority vested in the Commission. The argument refers to the fact that Sections 303(h) and 307(b) of the Act, 47 U.S.C. §§ 303(h), 307(b) (1964), empower the Commission "to establish areas or zones to be served by" radio stations and to provide for a "fair, efficient, and equitable" distribution of radio services "among the several States and communities." It notes that Section 303(s)[18] was enacted to effectuate the policy of encouraging local broadcasting by authorizing the Commission to require television receivers shipped in interstate commerce be equipped to receive UHF transmission (Gov't Br. 31-32). Finally, it refers to Sections 4(i), 303(f) and 303(r), 47 U.S.C. §§ 154(i), 303(f), 303(r) (1964), general provisions conferring authority upon the Commission to perform acts, make rules and regulations, prescribe restrictions and conditions and issue orders.

The Commission's assertion of jurisdiction over CATV, based on claimed authority over "interstate communication by wire" explicitly disavows reliance on the Commission's authority to regulate common carriers under Title II of the Act.[19] On the contrary, the Commission has expressly re-

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[18] 47 U.S.C. § 303(s) (1964). This is the so-called All-Channel Receiver Law. Pub. L. No. 87-29, 76 Stat. 150 (1962).

[19] This position was reiterated expressly in the Government's petition for certiorari, which stated (at p. 12):

> But the scope of the Commission's regulatory authority under the Communications Act is not confined solely to certificated common carriers and broadcast licensees. It extends to "*all* interstate and foreign communication by wire

jected the view that CATV systems are common carriers. *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966). It is also conceded that CATV is not engaged in broadcasting and that, therefore, its activities do not constitute unauthorized rebroadcasts in violation of Section 325(a) of the Act, 47 U.S.C. § 325(a) (1964). See Gov't Br. 33, n. 26.

Nor does the Government contend that CATV constitutes "radio communication." Midwest does so contend. (Midwest Br. 23) The suggestion was considered and rejected by the Commission when it originally decided it had no authority to regulate CATV. *CATV and TV Repeater Services*, 26 F.C.C. 403, 428-29 (1959). It was again discussed in the Commission's Memorandum On Its Jurisdiction and Authority, 1 F.C.C.2d 453, 478-82, issued on April 23, 1965, as an attachment to the *Notice of Inquiry and Notice of Proposed Rule Making* which initiated the *Second Report and Order*. However, when the Commission issued the *Second Report and Order* on March 4, 1966, almost one year later, it relied for its claim to jurisdiction solely on its view that CATV constitutes communication by wire. (App. 4-5) In these circumstances the contention that CATV also constitutes communication by radio cannot be considered here. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).[20]

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* * * and to all persons within the United States engaged in such communication, 47 U.S.C. 152(a)."

(Emphasis in original; footnote omitted.)

[20] The Radio Act of 1927, from which Title III of the Communications Act derived, was directed at the elimination of confusion, chaos and conflicting use of the radio spectrum. National Broadcasting Co. v. United States, 319 U.S. 190, 211-13 (1943). But CATV does not involve use of the spectrum, and the Act contains no standards for the regulation of this type of communication. However, if CATV were determined to constitute interstate communication by radio, substantially more difficult problems than any yet suggested could

A. History and Structure of the Communications Act of 1934.

Prior to 1934 the authority over radio communications now exercised by the Federal Communications Commission under Title III was exercised by the Federal Radio Commission pursuant to the Radio Act of 1927, 44 Stat. 1162. At that time the Interstate Commerce Commission regulated communications common carriers pursuant to the Interstate Commerce Act.[21] 41 Stat. 475. Section 1 of the Communications Act, 47 U.S.C. § 151 (1964), makes it clear that the purpose of the Communications Act was to vest in one central body the authority formerly exercised by separate agencies with different statutory grants in one statute administered by one agency,[22] and additionally to confer certain specified new authority upon the agency so established.[23]

Before the enactment of the Communications Act, only common carriers had been regulated under the Interstate

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arise concerning the Commission's present system of leaving a large measure of regulation to State and local authorities. The regulatory scheme for interstate communication by radio preempts the field and is "exclusive of State action." Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F.2d 153, 155 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

[21] In addition, the Postmaster General had certain jurisdiction over common carriers. S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934).

[22] *Ibid.*

[23] For example, Section 307(b), 47 U.S.C. § 307(b)(1964), as originally enacted was a new provision authorizing the issuance of additional licenses for stations not exceeding 100 watts in power. Similarly, Sections 325(b) and 325(c), 47 U.S.C. §§ 325(b), (c) (1964), were new provisions designed to give the Federal Communications Commission control over broadcast studios in the United States used to furnish programs to be broadcast to the United States from a foreign country. See S. Rep. No. 781, *supra*, at 6, 8; H.R. Rep. No. 1918, 73d Cong., 2d Sess. 48, 49 (1934).

Commerce Act. The relevant provisions of that Act were repealed by Section 602(b) of the Communications Act, 47 U.S.C. § 602(b) (1964), and were reenacted as Title II of the latter act. Only radio communication had been regulated pursuant to the Radio Act of 1927, which was repealed by Section 602(a) of the Communications Act, 47 U.S.C. § 602(a) (1964), and was essentially reenacted as Title III.

The structure of the Communications Act is comparatively clear. Title I 47 U.S.C. §§ 151-155 (1964), is entitled "General Provisions". It sets forth the purposes of the Act, establishes the Commission, defines the terms used and contains familiar organizational provisions. Section 1, Title I, is captioned "Purposes of Act, Creation of Federal Communications Commission". It states that "[f]or the purpose of regulating interstate and foreign communication by wire and radio", and for related purposes, "there is hereby created a commission to be known as the 'Federal Communications Commission'." Section 2(a), Title I, is captioned "Application of Act" and states that "*[t]he provisions of this Act* shall apply to all interstate and foreign communication by wire." (Emphasis added). Title II, 47 U.S.C. §§ 201-22 (1964), is entitled "Common Carriers" and deals only with common carriers "engaged in interstate or foreign communication by wire or radio," 47 U.S.C. § 201. Title III, 47 U.S.C. §§ 301-97 (1964), is entitled "Special Provisions Relating to Radio". Its purpose is set forth as, "among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission," 47 U.S.C. § 301. Title III confers broad powers upon the Commission to regulate radio transmission, including the power to issue radio station licenses, 47 U.S.C. §§ 303(e), 307(a); and licensing pursuant to the standard of "public convenience, interest, or necessity" is the basic instrument for the exercise of those powers. *Regents v. Carroll*, 338 U.S. 586, 597-98 (1950).[24]

[24] The remaining titles of the Act which are not pertinent to the questions presented, are captioned "Procedural and Administrative

Non-common carrier wire communication, whether or not interstate, does not fall within either of the two basic subject matters of regulation dealt with in the Act. It is not under Title II unless it is wire communication engaged in by a common carrier. Even if it should be conceded that CATVs engage in interstate wire communication, the Commission's consistent holdings that they are, nevertheless, not common carriers operates to exclude them from regulation under Title II. Similarly, CATVs are not subject to regulation under Title III because they are not engaged in radio communication.

B. Commission Regulation of Interstate Wire Communication by Non-Common Carriers

Once it is recognized that—whatever else CATV may be—it is neither a common carrier, nor engaged in radio transmission, it inevitably follows that CATV falls outside the regulatory areas defined in Titles II and III of the Communications Act whether or not it has interstate impact.[25]

Provisions" (Title IV; 47 U.S.C. §§ 400-10), "Penal Provisions" (Title V; 47 U.S.C. §§ 501-10) and "Miscellaneous Provisions" (Title VI; 47 U.S.C. §§ 6010xxx VI; 47 U.S.C. §§ 601-07).

[25]The contention that CATV systems, such as the respondents, whose operations are confined within a single state are nevertheless engaged in "interstate" communication by wire is subject to considerable question. Section 2(b) of the Act, 47 U.S.C. § 152(b) (1964), expressly precludes Commission jurisdiction even over carriers "engaged in interstate or foreign communication solely through facilities connected with the facilities of another carrier" not under common control or "solely through connection by radio, or by wire and radio, with facilities located in an adjoining State or in Canada or Mexico . . . of another carrier" not under common control. In his separate opinion, concurring in part and dissenting in part to the First Report and Order, Commissioner Loevinger concluded from Section 2(b) and similar limitations contained in Sections 214, 221(b) and 301(d) of the Act, 47 U.S.C. §§ 214, 221(b), 301(d) (1964), that the intent of Congress was ". . . to deny the Commission jurisdiction over intrastate carriers which are not part of a single integrated system and which simply carry signals emanating from another State." First Report and Order, 38 F.C.C. 683, 753-54 (1965).

Petitioners point out, however, that the term "communication by wire" in Sections 1 and 2(a) of the Act, is not limited to common carriers. And it is the use of the term in these sections which is relied upon by petitioners for the assertion of Commission authority over CATV; and that such references in the Act constitute a separate and independent grant of authority to regulate CATV activities. (Gov't Br. 29, 36; Midwest Br. 22, 30)

Stated otherwise, the linchpin of the petitioners' contention is that Section 2(a) of the Act confers authority over CATV as an activity in "interstate wire communication"; and, since the Commission has determined that CATVs are not common carriers, that it has authority to regulate such non-common carriers engaged in wire communication. If it does not have the claimed authority to regulate such non-common carriers the entire argument falls.

It is submitted that this essential basis of the Commission's claim to authority over CATV systems cannot be supported—that, on the contrary, under Section 2(a) of the Act the Commission does not have authority to regulate CATVs engaged in wire communication and that this is so whether or not the wire communication is interstate. This is manifest from the explicit terms of Section 2(a), which limit the Commission's authority to the "provisions of this Act"; the absence of any such "provisions", substantive or procedural, or authority relating to interstate wire communication by non-common carriers in general and CATV in particular; the legislative intent; and the history of the Act's administration.

Section 2(a) states only that the "provisions of this Act shall apply . . . to all interstate and foreign communication by wire," but does not describe which *provisions* apply, in which circumstances, under what terms, or to what extent. Such a delineation of authority—essential to valid delegation to an administrative agency—is set out in the other provisions of the Act. It is indisputable, based on a searching and meticulous examination, that the Act is devoid of *any*

single provision granting regulatory authority over non-common carriers engaged in wire communications.[26] The absence of any such regulatory provisions relating to non-common carriers engaged in wire communications, when contrasted with the comprehensive regulatory regime governing radio and common carriers spelled out in detailed provisions implementing Section 2(a), clearly reveals the purpose of the Act to regulate common carriers, but not to regulate non-common carriers engaged in wire communication.[27]

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[26] For this reason cases such as National Broadcasting Co. v. United States, 319 U.S. 190 (1943), and American Trucking Assn's v. United States, 344 U.S. 298 (1953), emphasized by the petitioners (Gov't. Br. 37-38; Midwest Br. 27-28) and by the District of Columbia Circuit in Buckeye Cablevision Inc. v. FCC, No. 20274 (D.C. Cir., June 30, 1967), are irrelevant. Those cases dealt only with the scope of regulatory authority over persons or entities (e.g., motor carriers and radio station licensees) already recognized to be subject to some regulatory authority. They are not precedents with respect to the extension of administrative authority to entities or persons not covered by the relevant statute at all.

[27] The terms "wire communication" or "communication by wire" appear in a number of sections of the Act other than Sections 1 and 2(a). Thus one or the other term is used in a number of the provisions of Title II, however only in connection with common carriers. Moreover, the terms may also be found in Sections 2(b), 3(a), 3(e), 4(b), 4(k), 4(o), 406, 410(a), 412, 502, 503(a), 602(b), 602(d), 604(c), 605 and 606 of the Act, 47 U.S.C. §§ 152(b), 153(a), 153(e), 154(b), 154(k), 154(o), 406, 410(a), 412, 502, 503(a), 602(b), 602(d), 604(c), 605, 606 (1964). A number of these provisions are also expressly confined in their impact to common carriers, e.g., Sections 406, 503(a) and 604(c). Others do have a direct or indirect impact upon non-common carrier wire communication. Section 605 prohibits wire tapping and is not limited to common carrier communication. Section 606 confers certain emergency powers upon the President – not upon the Commission – with respect to all forms of wire communication, but "during the continuance of a war" only. The limitation on financial interests of Federal Communication Commissioners, contained in Section 4(b), is not limited to interests in common carriers. Section 4(k) requires the Commission to make annual reports to Con-

In fact the Act confers upon the Commission only three functions with respect to wire communications generally, i.e., functions not limited to common carriers. Section 4(o), 47 U.S.C. § 154(o) (1964), directs the Commission to "investigate and study" problems relating to the maximum effective "use of radio and wire communication . . . [as they relate to the] safety of life and property." And Section 4(k), 47 U.S.C. § 154(k) (1964), directs it to make annual reports to Congress and provides that the reports shall contain "specific recommendations as to additional legislation" and are to contain information collected by the Commission "of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication." The limitation of an agency's function with respect to a specific subject matter to study, investigation and recommendation to Congress is familiar. *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 505 (1949). In addition, Section 605, 47 U.S.C. § 605 (1964), prohibits wire tapping with respect to "any interstate or foreign communication by wire or radio," and the Commission has comprehensive regulatory powers to effectuate that prohibition. *Benanti v. United States*, 355 U.S. 96 (1957). These three functions do not, of course, establish a general system for the regulation of non-common carrier wire communication.

The legislative history of the Act expresses the clear and unequivocal intent not to confer on the Commission regulatory authority over non-common carrier wire communication. The statement of the managers on the part of the

gress containing information that the Commission may consider "of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy." Similarly, Section 4(o) directs the Commission to investigate and study matters relating to "the use of radio and wire communications in connection with safety of life and property." Section 3(a) is merely a definition and serves only the normal purpose of a statutory definition. Thus these references to "wire communication" or "communication by wire" contained in the Act clearly establish no general system for the regulation of non-common carrier wire communication.

House, included in the Conference Report, noted that the Senate version of Section 3(h), 47 U.S.C. § 153(h) (1964),[28] had been adopted and stated:

> It is to be noted that the definition does not include any person if not a common carrier in the ordinary sense of the term, *and therefore does not include press associations* or other organizations engaged in the business of collecting and distributing news services which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to be rendered, the terms under which rendered, and the charges therefor.

H.R. Rep. No. 1918, 73d Cong., 2d Sess. 45-46 (1934) (emphasis added).[29] To treat Sections 1 and 2(a) as independent sources of regulatory authority would require a conclusion that the draftsmen smuggled authority into those sections which they deliberately excluded from Title II.[30]

Nor may it be argued that the Commission's asserted power over CATV differs from its clear lack of authority over the press and other non-common carriers engaged in communication by wire for the reason that such groups are not involved in and do not have an impact on broadcasting. The fact is that radio and television networks are similarly

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[28] Section 3(h) of the Act provides that " 'common carrier' or 'carrier' means any person engaged for hire, in interstate of foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[29] See also H.R. Rep. No. 1850, *supra* note 21, at 2, to the same effect.

[30] In this connection it is noteworthy that CATV systems carry and originate news programs.

engaged in communication by wire, and their involvement with and impact upon broadcasting in general and television in particular is profound. And it is also the fact that the Commission has not asserted jurisdiction over networks. On the contrary, the Commission has repeatedly and explicitly disavowed authority over the networks. Thus, in *Don Lee Broadcasting System*, 5 P&F Radio Reg. 1179, 1197-98 (1949), the Commission stated:

> The network regulations are designed to insure that control of the individual stations is not forfeited to a network organization with which such stations are affiliated. The networks, as such, are not licensed by the Commission and are under no statutory obligation to serve the public interest. The Chain Broadcasting Regulations, therefore, are designed to govern the conduct of the individual stations rather than the networks . . . .

The analogy between CATV operations over which the Commission has presumed to assert authority, and network operations where the Commission has disavowed authority is striking, and on "all-fours". Networks are engaged in transcontinental communication by wire for the purpose of "carriage" of television broadcast programs.[31] The availability of network programs and indeed the availability of network affiliation agreements is frequently crucial to the difference between success and failure of television broadcast operations and particularly UHF station operations.[32]

[31] It is irrelevant to the question presented that networks lease lines from telephone common carriers. But in any event many CATV systems also lease lines from the same companies and for the same purpose. And the Commission in asserting jurisdiction over CATVs does not distinguish between systems which own and those which lease their lines.

[32] "The inability of most UHF stations to obtain network affiliation, or, if affiliated, to obtain sufficient network commercial programs was an important factor in the limited development of the UHF service." Network Broadcasting, Report of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess. 226 (1958). See also App. 46-47, 50, 52, 54-55, 59.

Regulation of networks by the Commission could be a highly effective means of attaining Commission objectives not otherwise attainable, including its allocation plan for off-the-air service and service to local communities. One direct means of encouraging UHF broadcasting would be a requirement that networks accept as affiliates a certain percentage of UHF broadcasters.

The Commission, however, has never asserted that its general regulatory powers may be exercised upon the networks in order to foster its plan for allocation of television service.[33] Instead, it has expressly advised Congress that "The Commission has no jurisdiction over networks as such and the Commission does not have authority to license or regulate networks"[34] and that the Commission "cannot reach networks directly".[35] When it has deemed it desirable to exercise direct regulatory authority over networks, it has sought such authority from Congress.[36] Based on fact, logic

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[33] Thus, the chain broadcasting regulations involved in National Broadcasting Co. v. United States, *supra*, note 26, were "addressed in terms to station licensees and applicants for station licenses" and not to networks. 319 U.S. at 198.

[34] H.R. Rep. No. 1297, 85th Cong., 2d Sess. 628 (1957).

[35] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, *Responsibilities of Broadcasting Licensees and Station Personnel*, 86th Cong., 2d Sess. 672 (1960).

[36] With the support of the Commission, two bills were introduced in the 86th Congress. One was H. R. 5042 (entitled in part "A Bill To Amend the Communications Act of 1934 To Subject Television Networks to Certain Controls"), and the other was H. R. 11340 (entitled in part "A Bill To Amend the Communications Act of 1934 . . . To Provide for the Regulation of National Networks"). H.R. 5042 provided authority for the Commission to make rules and regulations directly applicable to the television networks, while H. R. 11340 provided for the exercise of regulatory authority over the networks under a mandatory system of licensing national net-

and law, the assertion by the Commission of jurisdiction over CATV and the explicit disavowal of jurisdiction over networks is a flat and absolute contradiction. And the assertion of jurisdiction over CATVs cannot be defended in the light of the Commission's opposite answer over the course of more than three decades to the identical question presented with respect to networks. On the contrary, since the Commission has not presumed to claim jurisdiction over the networks which are the lifeblood of broadcast operations, how can it validly assert such authority over CATV?

The compelling conclusion that the Commission does not have authority over wire communication by non-common carriers also is supported by the consistent and uniform practice of the Commission in other areas over an extended period of time. For years non-common carrier wire communication systems have been in extensive use and have not been subjected to regulation by the Commission. In addition to the press services, hundreds of thousands of miles of private non-carrier communication systems have been operated (some as early as 1851) by railroads, electric power, petroleum and natural gas pipeline companies with rights of way or similar facilities which make it practical for them to do so. See *AT&T (Railroad Interconnection)*, 32 F.C.C. 337 (1962). The railroad industry alone maintained over 200,000 miles of pole line in 1957.[37] Yet the Commission has never—before it asserted authority over CATV—undertaken to regulate the operation of such systems.[38] Thus, while the an-

works. Each was designed to give the Commission specific regulatory authority over the networks. See H. R. Rep. No. 281, 88th Cong., 1st Sess. 149-50 (1963). Neither bill was enacted, and similar legislation, introduced in the 87th Cong., 1st Sess. as S. 2400, also failed of enactment.

[37] See In the Matter of Allocation of Frequencies in the Bands Above 890 mc, 27 F.C.C. 359 (1959).

[38] The only area affecting such private wire communication systems which the Commission undertakes to regulate relates to whether the practices of common carriers, subject to Commission authority, per-

nual reports of the Commission make reference to Sections 1 or 2(a), the functions they describe include only the regulation of common carriers and radio communication; they do not refer to non-common carrier wire communication.[39]

C. The Communications Act Provides None of the Required Substantive and Procedural Standards for Regulation of Wire Communication by Non-Common Carriers.

The structure of the Communications Act is such that the assumption that the Commission has authority to regulate non-common carrier forms of wire communication leaves it wholly without statutory standards for the exercise of the authority. In sharp contrast, the Act does contain both general and detailed standards for the regulation of radio communication and common carriers. The licensing power which the Commission exercises with respect to radio under Title III must be administered in the "public interest, convenience, or necessity", a standard found adequate in *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co.*, 389 U.S. 266, 285 (1933), and *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943), in the light of its context, the purposes of the Act and the requirements it imposes. Similarly, the standards used for the regulation of common carriers pursuant to Title II are familiar and adequate for public utility regulation.[40] These general standards are given flesh in numerous provisions of the Act

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mitting or denying the private wire communication systems to interconnect with the carriers are discriminatory. AT&T (Railroad Interconnection), 32 F.C.C. 337 (1962). This, of course, represents a regulation of the carriers, not of the non-carrier wire communication system seeking interconnection.

[39] See, *e.g.*, 18 F.C.C. Ann. Rep. 13, 15 (1952); 28 F.C.C. Ann. Rep. 15 (1962); 31 F.C.C. Ann. Rep. 10 (1965).

[40] *E.g.*, Section 201 requires charges, practices, etc., to be "just and reasonable" and Section 214 requires certificates of "public convenience and necessity" for common carrier operations.

dealing with substantive, procedural and remedial matters relating to the regulation of common carriers and radio communication. Those provisions incorporate the basic legislative standards governing the regulatory authority conferred on the Commission. They specify with care, precision and detail the substantive and procedural criteria for regulation under Title II[41] and under Title III.[42]

Moreover, the Act expresses an explicit concern with areas of radio and common carrier activities excluded from regulation by the Commission and, therefore, subject to regulation by the states.[43] An assertion of plenary Commission jurisdiction over CATV based solely upon the language of Sections 1 and 2(a) must assume that Congress was wholly unconcerned with problems relating to the appropriate areas of state and federal regulation over non-common carrier wire communication. This assumption flies in the face of its dis-

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[41] *E.g.*, unjust and unreasonable discriminations, 47 U.S.C. § 202(a); the use of franks and passes, 47 U.S.C. § 210(a); adequacy of facilities, extension of lines and public offices, 47 U.S.C. § 214(d); required records and depreciation practices, 47 U.S.C. § 220(a)(b); length of suspension of new charges, and hearing requirements, 47 U.S.C. § 204; court injunction involving reductions or extensions of service, 47 U.S.C. § 214 (c); cease and desist authority, 47 U.S.C. § 205(a); claims for damages in proceedings instituted either in the courts or before the Commission, 47 U.S.C. §§ 206, 207, 208 and 209.

[42] *E.g.*, classification of radio stations, including areas and zones served and power and time of operation, 47 U.S.C. § 303; restrictions on grants to aliens, 47 U.S.C. § 310; operation of transmitting apparatus by licensed operators, 47 U.S.C. § 318; standards for distribution of licenses, frequencies, hours of operation and power among the several states and communities, 47 U.S.C. § 307(b); terms of licenses and standards, as well as procedural requirements governing renewals, 47 U.S.C. § 307(d); and substantive and procedural conditions governing modification, suspension and revocation of licenses, 47 U.S.C. §§ 303(f), 303(m), 312 and 316.

[43] See note 25, *supra*.

closed and explicit concern with respect to radio and common carrier regulation.

No such similar panoply of substantive and procedural provisions may be found in the Act with respect to wire communication engaged in by non-common carriers. The general regulatory provisions relied upon by the petitioners qualify the power granted with limitations such as "not inconsistent with this Act, as may be necessary in the execution of [the Commission's] *functions*" (Section 4(i)); "not inconsistent with law as it may deem necessary . . . to carry out the *provisions* of this Act" (Section 303(f)); "or as may be necessary to carry out the *provisions* of this Act" (Section 303(r), emphasis added). However, with respect to non-common carrier wire communication there are no "provisions of this Act" or Commission "functions" defined elsewhere in the Communications Act to give meaning or limit to these general regulatory powers. And in the absence of any substantive and procedural authority or limitation, the petitioners' argument is reduced to the contention that the Commission has the jurisdiction to regulate CATV, i.e., wire communication conducted by non-carriers, for such purposes and by such means as it may consider appropriate.

A further difficulty with petitioners' position is that it chooses from only one of the multitude of objectives contained in the Act, some of which relate to radio communication and some of which relate to common carriers, to provide the required standards. The *Second Report and Order* discloses that the Commission made the deliberate judgment that CATV should operate as a subordinate or auxiliary to television broadcasting and that the development of CATV should be limited by this objective. (App. 22) The virtually explicit premise of the objective which it chose was to protect and insulate from competition the broadcast industry which it does have the power to regulate. On the legal theory proposed, the Commission might have been equally free to choose entirely different objectives as the bases for regulation.

The Government asserts:

> Once the nature of CATV and its potential impact on broadcasting is comprehended, it is virtually self-evident that the administrative agency charged by Congress with the regulation of broadcasting, and endowed with sweeping authority to perform that function, has jurisdiction to regulate this new and significant development in the communications field.

(Gov't Br. 28) On this theory the Commission might have concluded with equal "validity" that the mandate of Section 307(b) of the Communications Act, which provides for a "fair, efficient and equitable distribution of radio service", requires that television broadcasting be curtailed and replaced by CATV in order to conserve valuable spectrum space. Alternately, the Commission could have with equal "logic" chosen to regulate CATV in such a manner as to supplement common carrier service but to curb any threat it may present to communication common carriers.[44] The availability of such a wide choice of regulatory objectives amounts to no statutory standard whatsoever.

Even if it were possible to conclude that Sections 303(h) and 307(b) provide a substantive standard of some sort, no procedural standards whatsoever are provided for the regulation of non-common carrier wire communication. In the

[44] In a recent article one of the Federal Communications Commissioners has pointed out that CATV has significant future potential to provide new communication services, such as printing of newspapers at home, shopping from home, and specialized teaching at home and by originating programming to meet special areas of interest. In this connection, he points out that CATV "might be a vigorous and useful check on the big telephone monopolies", but that it is unlikely that its future will "be as splendid as all this . . . Its fate is now being determined in a grim political and economic struggle with the giant interests whose prosperity and power it has challenged – the broadcast industry and the telephone companies." Nicholas Johnson, *CATV: Promise and Peril.* Saturday Review, November 11, 1967, p. 87.

area of radio and common carrier regulation procedural provisions of the Act operate to give meaning and assure procedural due process in the Commission's exercise of the delegated regulatory powers. To choose but two examples, radio stations licenses may be modified under Section 316 of the Act, but that provision requires a prior hearing on request. Similarly, the Commission is authorized under Section 214(d) of the Act to require a carrier to improve its service by providing adequate facilities, extending lines, etc. However, that provision requires a prior "full opportunity for hearing".

The complete absence of either procedural or substantive standards for the asserted authority to regulate CATV as a non-common carrier wire communication activity permits only one of two possible conclusions. The first is that even if Congress may have intended the Commission to exercise regulatory authority over such activity, the attempted delegation is unconstitutional for lack of standards. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The second is that the lack of standards evidences Congress' intent that such activities not be regulated. The latter conclusion is wholly consistent with the legislative history and structure of the Act.

D. The Commission's Claim to Regulatory Authority Over Non-Common Carrier Wire Communication Is Wholly Inconsistent With Its Historic Administrative Practice.[45]

Neither the Government nor Midwest attempts to argue that the provisions of the Act they cite and which confer substantive powers upon the Commission, even when combined with the general regulatory provisions, authorize it to regulate activities or entities not otherwise subject to Commission jurisdiction. Nor can that contention be made. This is the essential holding of *Regents v. Carroll*, 338 U.S. 586 (1950), which confirmed the power of the Commission to require a radio licensee (i.e., a subject of its regulatory authority) to disaffirm a contract as a condition of renewal of license. However *Regents* also held that this authorized action of the Commission could not operate to prevent the other party to the contract—a non-licensee—from obtaining appropriate relief for the breach of contract. Indeed, if the law were otherwise it would operate to extend the Commission's jurisdiction to activities which may be so conducted as to have an incidental or even direct impact upon the Commission's allocation plan for off-the-air television service, but which are beyond the Commission's competence to regulate—e.g., the production and distribution of motion pictures, the activities of the press, broadcasting network practices,[46] or before the All-Channel Receiver Law, 47 U.S.C. § 303(s) (1964), was enacted, the shipment of television sets in commerce.

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[45] Microwave relay systems are clearly a form of radio communication. In consequence, cases dealing with Commission jurisdiction over such systems, e.g., *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963), and *Idaho Microwave, Inc. v. FCC*, 352 F.2d 729 (D.C. Cir. 1965), are irrelevant. Moreover, in each case the microwave service involved was a common carrier.

[46] See *supra*, pp. 28-31.

As Petitioners point out, the inability until recently of most television sets to receive UHF signals represented a formidable obstacle to the development of UHF broadcasting and therefore to effectuation of the Commission's assignment plan. (Gov't Br. 5, 32; Midwest Br. 5) However, the Commission made no attempt to contend, as it has with respect to CATV, that interstate shipment of sets equipped to receive only VHF affected and threatened to disrupt its plan for off-the-air television service and therefore is subject to the Commission's general regulatory powers. Rather, as it did with respect to networks, and CATV[47] it requested legislation, empowering it to deal with the problem. In so doing it frankly stated:

> In the Communications Act of 1934, Congress vested the Federal Communications Commission with the responsibility of making available to all people of the United States, an efficient and nationwide communications service, and certain authority to carry out these responsibilities. Our request for this legislation is an expression of our feeling that in the area of television reception systems, our present authority is not commensurate with our responsibilities . . .[48]

In sum, the Commission regards CATV as a form of wire communication, but not as one conducted by common carriers; since, as demonstrated above, no provisions of the Act confer general regulatory authority over non-common carriers engaged in wire communication, the Commission lacks authority over the subject matter.

Accordingly, if the Commission considers regulations appropriate it must seek authority and direction from Congress. And, in fact, after concluding that it lacked regula-

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[47] See p. 20, *infra*, and App. A.

[48] Hearings on H.R. 8031 Before the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess. 7-8 (1962).

tory authority in 1959, *CATV and Repeater Services*, 26 F.C.C. 403 (1959), the Commission did seek appropriate legislation. The continuing and repeated efforts to obtain such legislation are set forth in Appendix A hereto.[49] The Commission's failure to obtain such legislation strongly suggests a Congressional awareness and acquiescence in the Commission's 1959 determination that it lacked such jurisdiction.[50] This acquiescence is entitled to great weight. *United States v. Leslie Salt Co.*, 350 U.S. 383, 396-397 (1956). See also *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1956).

The precise question here presented is whether non-microwave CATV may, as a form of wire communication conducted by non-common carriers, be regulated by the Commission pursuant to the Communications Act. It is submitted that the foregoing discussion amply supports the conclusion that the Communications Act confers no general regulatory authority over such wire communication upon the Commission and that, therefore, CATV is not subject to such regulation.

This conclusion obviously does not preclude an act of Congress conferring regulatory authority over CATV upon the Commission or some other body. Moreover, such legislation would supply answers to a host of questions which an assumption of plenary jurisdiction under Sections 1 and

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[49] The Commission's description of these efforts through the 88th Congress are set forth at note 6, *supra*. Appendix A also describes the legislative treatment of CATV in the 89th Congress and discloses that nothing has since occurred to indicate the existence of any different Congressional view.

[50] Such efforts to obtain legislation are pursuant to the mandate of Section 4(k)(1) of the Act to make annual reports to Congress on "such information and data collected by the Commission as may be of value in the determination of questions connected with the legislation of interstate and foreign wire and radio communication and radio transmission of energy" and Section 4(k)(5) to make "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable."

2(a) give rise, including: Shall CATV be licensed and if so, by whom and for what period? Shall CATV systems pay a franchise fee or rather, as in broadcast, shall the license be granted free? Shall the rates charged by CATV to the viewer be regulated and if so, by whom and upon what basis?

Although the Commission has undertaken to answer some of these questions and refrained from answering others, its claim to plenary jurisdiction necessarily involves a claim of authority to answer all. The answers which it has furnished have been supplied without any statutory guidance or direction and are at variance with the explicit directions of Congress in conferring authority on the Commission under Titles II and III.

II

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ISSUE THE RESTRAINING ORDER HERE INVOLVED

The order here involved, characterized by the Commission as one for "temporary relief", has imposed, without an evidentiary hearing, a prolonged restraint on the activities of the respondents which are concededly wholly legal and not in violation of any Commission regulation concerning the operation of CATV systems.

Reduced to its essentials, the contention of the petitioners is that the Commission has the power to issue a "rule", 47 C.F.R. § 74.1109 (1967), which explicitly provides that the Commission may ignore, modify, alter or revise all of its other CATV rules with respect to any particular CATV system—and that it may do so in any manner it chooses. It is conceded, however, that under the statutory provisions relating to cease and desist orders the Commission does not have the power to issue a temporary restraint against unlawful activity without a hearing. Yet here the Commission contends that it does have the power to restrain activity without a hearing when that activity *is* lawful.

Sections 4(i) and 303(r), general regulatory provisions of the Communications Act, are the only authority cited as

supporting the Commission's power to impose the restraint here involved.

The contention assumes that the Commission does have authority to regulate non-microwave CATV systems and falls in any event if, as is argued in Point I of this brief, it does not have such authority. However, the powers which the petitioners read into Sections 4(i) and 303(r) could affect far more than CATV, and could well govern other activities subject to regulation under the Communications Act. The extraordinary nature of the power exercised is analyzed below.

A. The Nature of the Restraints Involved.

The Commission's view of the nature of the restraint involved herein is set forth in its Memorandum Opinion. (App. 146) The Government's Brief contributes little to clarify the nature of the action taken by the Commission. It asserts that such temporary relief was not intended as a sanction for a violation of laws or Commission rules. (Gov't Br. 51) It asserts that the instant stay is a necessary interim measure while the Commission "is attempting to establish, in an evidentiary proceeding, a rule for the conduct of regulated activity in a particular market . . . The agency itself must assess the need for maintaining the status quo. Its powers to do so derive from the same statutory sources that enable it to adopt the final rule." (Gov't Br. 53)

There is no question but that the order here involved represents an exercise of injunctive powers by an administrative agency. The order restrained the continuation of CATV activities "pending final disposition of this proceeding" (App. 170-71). The Commission itself described Midwest's original petition for temporary relief as one for an order to "cease and desist." (App. 147) The Government explicitly concedes the injunctive nature of the relief involved. "If any agency lacks the statutory authority to prescribe an interim stay pending an evidentiary hearing, the agency's only re-

course is to apply to a court of appeals for an injunction . . . ." (Gov't Br. 52)[51]

B. The Statutory Sources Relied Upon for the Injunctive Power Asserted.

Sections 4(i) and 303(r) of the Act are framed in language familiar in statutes conferring conventional powers upon an administrative agency.[52] The contention that they confer the extraordinary injunctive power here asserted is based upon authorities interpreting administrative powers in very different and completely inapposite circumstances. (Gov't Br. 45-47; Midwest Br. 45-46) The question here presented is whether Sections 4(i) and 303(r) authorize the injunctive power exercised. The general language of these sections requires that this question be tested in the light of the structure of the Act, and its legislative history rather than by sweeping cliches of statutory interpretation which literally assume the answer to the question presented.

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[51] Both petitioners concede that the injunctive procedure employed in FTC v. Dean Foods Co., 384 U.S. 597 (1966) was available to the Commission. Although petitioners presume the availability of injunctive relief, they attempt to defend the imposition of such a restraint by the Commission's own order on the ground stated by the Commission that the latter course was "preferable". (Gov't Br. 52-53; Midwest Br. 48).

[52] Section 4(i), 47 U.S.C. § 154(i) (1964), provides as follows:

> (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303(r), 47 U.S.C. § 303(r) (1964), provides that the Commission shall –

> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

This task is made more difficult because the problem arises in the context of the Commission's asserted jurisdiction over CATV. As pointed out above (*supra*, pp. 32-34), the Communications Act is replete with explicit provisions which give meaning and limitation to the substantive and procedural powers granted to the Commission in areas it was expressly intended to regulate. For example, Section 316(a) of the Act, 47 U.S.C. § 316(a) (1964), expressly authorizes the Commission for stated reasons to "modify a station license or construction permit". This power to modify is available when the Commission has permitted a station to transmit signals in a manner that interferes with other legitimate uses of the radio spectrum. Nevertheless, Section 316(a) expressly requires that before the Commission modifies a license the licensee must be accorded a hearing if he so requests; and Section 316(b), 47 U.S.C. § 316(b) (1964), provides that at the hearing "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

It is therefore clear that the limiting impact of provisions of the Act relating to fields other than CATV would not permit the language of Sections 4(i) and 303(r) to operate in those fields with the same expansive and unlimited meaning claimed with respect to CATV. Since the Act does not deal with non-carrier wire communication, it does not contain similar sources of illumination and limitation. Paradoxically, it is this very lack upon which the Government relies to support the Commission's claim that its authority to regulate CATV "must encompass all that is necessary to prevent frustration of the Act's purposes." (Gov't Br. 45)

As we have earlier noted, this is but another way of claiming that not only has Congress directed the Commission to regulate CATV, it has directed it to do so pursuant to any procedures the Commission sees fit to adopt. Such a contention is so patently at odds with the Administrative Procedure Act and standards for the delegation of powers that it must be rejected out of hand. Rather, it is neces-

sary to look both to Sections 4(i) and 303(r) themselves and to a complex of relevant background in order to determine whether these provisions in fact confer the injunctive powers claimed.

This examination must be undertaken in the light of the clear record, documented in detail below, that Congress has been exceedingly chary in granting injunctive powers to administrative agencies and that the courts have been equally cautious in finding that such grants have been made. The law has been summarized as follows:

> Congress has granted to some agencies the power to issue orders effectively preserving the status quo, at least for a certain length of time, pending their own decision. Absent such statutory grant, however, it does not appear that a Federal administrative agency can issue such orders, regardless of the harm which may occur pending its decision or the possible inefficacy of orders it may enter after decision.

Jaffe, *Judicial Control of Administrative Action* 662 (1965).[53]

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[53] The reasons for this cautious approach has been summarized as follows in Gellhorn, Administrative Law Cases and Comments 774 (1960):

> . . .to argue that the legislature may constitutionally grant power to make provisional determinations summarily, is not to argue that the legislature should freely do so. Such a power involves obvious and grave dangers. Its misuse might destroy as fully as its proper use might protect. Before it is conferred, therefore, the legislature should in each particular case cautiously evaluate the need for so potent a weapon. Moreover, provisional orders pending the outcome of formal hearings should be allowed to have only a limited life span, lest delay in bringing cases on for hearing convert temporary decisions in effect into final ones. Further, the need for truly summary entry of provisional orders is infrequent. Rarely will a case arise in which time cannot be allowed for a hearing on the question whether good cause exists for making an order in advance of the hearing on the merits.

Aside from the fact that injunctive powers are not lightly conferred upon administrative agencies, the relevant language of Sections 4(i) and 303(r) evidence no intention to do so.[54] No such intention can be gleaned from language authorizing the Commission to "perform any and all acts" and "to issue such orders not inconsistent with this Act, as may be necessary in the execution of its functions" (Section 4(i) and "to prescribe such restrictions and conditions not inconsistent with law, as may be necessary to carry out the provisions of this Act" or of a treaty or international convention. (Section 303(r)). Indeed, this language justifies the conclusion that they are basically enabling provisions intended to implement specific provisions of the statute, not general grants of independent substantive authority which authorize the extraordinary action taken in this case. See *FCC v. American Broadcasting Co.*, 347 U.S. 284, 289-90 (1954). Their scope must be measured by reference to the express provisions and purposes contained in other sections of the Act. *Alabama Elec. Coop., Inc. v. SEC*, 353 F.2d 905 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 968 (1966). Thus, for example, these sections are validly employed to issue rules governing radio stations engaged in network broadcasting in view of the express authority conferred over such activities.[55] *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Similarly, the sections are properly employed to implement the express Congressional policy against monopoly enunciated in the Communications Act by limiting the number of stations under

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[54] The legislative history of Section 4(i) is set forth in Appendix B hereto; the legislative history of Section 303(r) is set forth in Appendix C hereto.

[55] Section 303(i) of the Act, 47 U.S.C. § 303(i) (1964), provides that the Commission shall "Have authority to make special regulations applicable to radio stations engaged in chain broadcasting."

common ownership or control. *Storer Broadcasting Co. v. United States*, 240 F.2d 55 (D.C. Cir. 1957).[56]

A basic and critical fallacy in petitioners' position is that Sections 4(i) and 303(r) contain explicit conditions which, in any event, operate to bar the power to issue the restraints involved herein. Thus, even if these sections were "construed" as grants of sweeping injunctive authority such authority in Section 4(i) is expressly limited to acts and orders "not inconsistent with this Act" and Section 303(r) is similarly limited to restrictions and conditions "not inconsistent with law." It is indisputable, however, that the restraints involved herein are squarely inconsistent with this Act and law since the limited restraining powers granted in the Act and by law are expressly conditioned on rigid observance of detailed procedural due process requirements.[57]

The legislative history of Section 4(i) (set forth in Appendix B) demonstrates no intent by Congress to make a broad grant of the extraordinary powers here involved. Section 4(i) was derived from a provision of the Interstate Commerce Act, 49 U.S.C. § 17(3) (1951), which was designed to permit the ICC to control "the order and regulation of proceedings before it."[58] It was desired that the new commission have similar powers, and Section 4(i) was described "as more general in terms and may be sufficient in scope to cover rules of practice and forms of pleading." (App. B). The legislative history makes it abundantly clear

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[56] See Section 313 of the Communications Act, 47 U.S.C. § 313 (1964).

[57] See, *e.g.*, Sections 204, 205(a), 214(c), 303(f) and (h), 312 and 316 of the Act.

[58] Subsection 4(i) of the Communications Act is contained in the Section entitled "Provisions Relating to the Commission" which sets forth and deals with such administrative matters as the number and salaries of the Commissioners; the location of the principal office; the employment of staff members; the fixing of payment of overtime to staff engineers; the making of expenditures for rent; expenses for

that this section was conceived as limited and narrow in scope, and not as a source of administrative injunctive power.

Section 303(r) was not part of the original Communications Act of 1934, but was enacted in 1937 as a consequence of unfortunate losses of life on the high seas in the *Morro Castle* and *Mohawk* disasters. The legislative history of the provision (set forth in Appendix C) shows that the only purpose of the provision was to extend the Commission's general regulatory and rule making powers to make it possible to give effect to "any international radio or wire communication convention" relating to safety at sea. Reliance on this provision to support sweeping and general injunctive powers by the Commission is wholly untenable.

C. The Significance of Section 312(b).[59]

The Communications Act of 1934 originally provided in Section 312 that the Commission was empowered to revoke a station license upon stated terms and conditions. As enacted, the provisions of Section 312 of the Act comprised the exclusive authority of the Commission to enforce administratively its decisions and orders with respect to the regulation of radio.[60] It soon became apparent, however, that this remedy was inappropriate and unduly harsh for a host of minor and relatively less serious offenses. Accord-

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supplies, books, periodicals, etc. The subsection immediately preceding 4(i) defines a quorum and provides: "The Commission shall have an official seal which shall be judicially noted." 47 U.S.C. § 154(h) (1964).

[59]The legislative history of Section 312(b), 47 U.S.C. § 312(b) (1964), is set forth in Appendix D hereto.

[60]Powers were also conferred upon the Commission by Sections 205(a) to issue cease and desist orders against common carriers with respect to charges, classifications, etc., determined to be in violation of the Act after "full opportunity for hearing". 47 U.S.C. § 205(a) (1964).

ingly, early in its history the Commission sought to supplement its authority so that it could deal appropriately with the regulatory problems presented. The history of the Commission's continuing attempts over the course of more than two decades to supplement and add to its enforcement authority is set forth in Appendix D hereto.

The Commission's efforts to obtain additional and more flexible enforcement authority was given impetus by the decision of this Court in *Regents v. Carroll*, 338 U.S. 586 (1950). Referring to a series of earlier cases before this tribunal, this Court concluded:

> These cases make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions.

338 U.S. at 598-99. The Court also noted that the Commission had been actively engaged before Congress in seeking authority for additional sanctions, but that the Commission's request for legislative action "did not go beyond asking for power to issue a cease and desist order against a licensee." 338 U.S. at 602.

Subsequent to the *Carroll* case, Congress in 1952 granted the Commission, in Section 312(b) of the Communications Act, the power to issue cease and desist orders. However, both the legislative history of that amendment to Section 312 and the language of the amendment make it clear that this new sanction is limited in scope and demonstrate the care with which Congress delegates injunctive powers to regulatory agencies. Consequently, the power to issue cease and desist orders may be exercised only for violations of the law, of Commission rules and regulations and license requirements. Moreover, the power may be exercised only in the case of past and not in the case of impending violations. Similarly, the procedural requisites have been carefully defined. The Commission must provide alleged violators with notice, specification of issues and a full hearing at which it must bear the burden of proof and of going for-

ward before it may enjoin them, i.e., before it may order them to cease and desist.

The legislative history also discloses that Congress has given detailed consideration to numerous proposals to expand the enforcement powers of the Commission, including suspension of licenses and institution of injunctive actions in the court pending the completion of show cause proceedings pursuant to Section 312(b). It is particularly significant that Congress has refrained from conferring authority, expressly requested by the Commission, to apply to the district courts for a temporary injunction pending the completion of show cause proceedings pursuant to Section 312(b) and involving alleged violations.[61] (App. D)

Petitioners contend that Section 312(b) is irrelevant, since it operates only as a sanction for past violations (Gov't Br. 51; Midwest Br. 50-51) and no violation is here alleged. The point is wide of the mark. In view of the express provisions of Section 312 and the legislative history the only valid conclusion is that the injunctive power expressly conferred in that section is the only one intended to be available to the Commission; and that additional injunctive power may not be inferred from the general language of Sections 4(i) and 303(r).

Nor is it relevant to this conclusion to describe the temporary injunction which the Commission issued in this case, somewhat delicately, as "merely an interim measure to assure that the public interest would not be frustrated pending a full hearing on what the public interest ultimately required." (Midwest Br. 51; Gov't Br. 51) When the Commission sought and failed to receive authority to obtain temporary injunctions from the courts pending the comple-

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[61] When he made the request on behalf of the Commission, its chairman stated that "The Federal Trade Commission is authorized in some situations to request the courts to enjoin or restrain an offending practice pending a final determination of the matter in an appropriate agency proceeding. In our view comparable legislation for the Federal Communications Commission would be in the public interest." (App. D 7-8).

tion of cease and desist proceedings against alleged violators, it was seeking the means to accomplish the same objective, i.e., it was also seeking "an interim measure to assure that the public interest would not be frustrated pending a full hearing."[62] However, since Sections 4(i) and 303(r) do not distinguish between those accused of violations and those conceded not to be in violation, the patent fallacy of petitioners' contention is that these provisions of the Act apply to both alike and the Commission's request for authority to obtain temporary injunctions from the courts was wholly unnecessary.

The Commission proceedings, before and after the decision of the Court in *Buckeye Cablevision, Inc. v. FCC*, No. 20,274 (D.C. Cir., June 30, 1967), is most revealing as to the extreme and wholly indefensible view taken by the Commission regarding the nature and extent of its authority to issue restraining orders of the type involved herein.[63] In the *Buckeye* case, the District of Columbia Circuit was presented with a permanent cease and desist order issued by the Commission after a hearing pursuant to Section 312(b) of the Communications Act against further *violation of the Commission's distant signal rules*. The power of the Commission to compel compliance with its rules was upheld by the Court in the *Buckeye* case.

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[62] In its request for such authority the Commission conceded that cease and desist sanctions are "severe", but that "the rights of the licensee are well protected by the hearing requirements of the Act." It asserted however, "in some situations a more expeditious means of dealing with an undesirable situation appears to us to be in the public interest . . . to request the court to restrain an offending practice pending a final determination of the matter in an appropriate agency proceeding." (App. D. 7)

[63] It will be noted that both petitioners relied principally and most heavily on the decision in *Buckeye Cablevision* in support of the requested writ of certiorari in this case.

After that Court decision, a new proceeding was initiated by the Commission – this time under Section 74.1109 of its rules – looking toward restraining the CATV system *from carrying Grade B signals authorized by the rules.* Pending an evidentiary hearing directed at this issue, the Commission imposed a "temporary" restraint upon Buckeye similar to that imposed upon the respondents in this case. *Buckeye Cablevision, Inc.*, 10 F.C.C.2d 745 (1967). If the Commission enjoys the unprecedented stay power which it claims, the earlier 312(b) proceeding was a pointless exercise and an imposition on the Court of Appeals. Incredibly, in the very same case the Commission, following court approval of its observance of the procedural due process requirements of Section 312 of the Act which were invoked for violations of its rules, promptly ignored such "niceties" and invoked its claimed authority under Section 74.1109 of its rules to restrain activities which were in compliance with all of its rules governing CATV operations.

D. The Congressional Attitude Toward Administrative Injunctive Power.[64]

The petitioners characterize the authority conferred upon the Commission by Sections 4(i) and 303(r) as "sweeping" or as a "broad grant" (Gov't Br. 45; Midwest Br. 37) and therefore adequate to confer the injunctive powers here exercised even in the absence of express language providing for such power. The attempt to find such authority in the general language of these provisions contravenes the underlying philosophy and consistent practice of Congress with respect to the grant of injunctive power to administrative agencies. Such relief is limited to instances where a violation is likely to cause insolvency or a substantial dissipation of the assets of a financial institution or is likely to otherwise seriously prejudice the interests of the saving account

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[64] A survey of the injunctive powers of 17 federal departments and agencies is set forth in Appendix E hereto.

holders. 12 U.S.C. §§ 1464(d), 1730, 1818 (Supp. II, 1965-66).[65]

To contend, as the petitioners do, that the injunctive power – particularly the power to issue *ex parte* temporary injunctions pending an administrative hearing – has been delegated to the Federal Communications Commission without express statutory authority, or any Congressional expression of intent to do so, or even consideration of the problem, is totally contrary to the consistent, deliberate and selective pattern of Congressional action in the area.

Congress has historically exercised the utmost care and selectivity in dispensing injunctive or cease and desist powers to the agencies. A survey of seventeen federal departments and regulatory agencies, as set forth in Appendix E, clearly demonstrates the care, precision and extreme caution with which Congress has made such powers available. In every case the grant and scope of such powers has been tailored to meet the particular needs of the agency involved and the areas of responsibility delegated to it. Both the criteria for the invocation of these powers and the detailed procedures to be employed are spelled out with particularity in all instances by Congress and *never* left to presumption or inference.

Only one departure has been found in the uniform Congressional insistence that temporary relief be obtained through the courts.[66] This is contained in the recently en-

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[65] Significantly, this exercise of emergency powers by a federal agency without prior hearing or resort to the court, is specifically authorized by Congress and is a modification of the more drastic previous Bank Board power to take over the actual management of the financial institution in similar instances. Act of June 13, 1933, ch. 64, § 5, 48 Stat. 132. The care with which Congress considered the Bank Board's and related agencies' recently granted power is illustrated by the legislative history. (App. E)

[66] The statutes authorizing such interim relief through the courts often impose prerequisites and standards upon the granting of such

acted Financial Institutions Supervisory Act of 1966 § 101(a), 12 U.S.C. § 1464(d) (Supp. II, 1965-66), which specifically authorizes the Federal Home Loan Bank Board, and related agencies, to issue a temporary injunctive order, without a hearing, pending evidentiary hearings.

E. Judicial Precedents.

The conclusion impelled by the Communications Act itself, its legislative history and the pattern of Congressional treatment of administrative power is fully supported by judicial precedent. In *Trans-Pacific Freight Conference of Japan v. Federal Maritime Board*, 302 F.2d 875 (D.C. Cir. 1962), the Federal Maritime Board issued an order prohibiting a voluntary association of steamship companies from assessing or collecting fines pending completion of a hearing as to an alleged violation of Section 22 of the Shipping Act, 46 U.S.C. § 821(1964). The Board argued that the temporary order was necessary to prevent irreparable injury. Even though the order was issued after oral argument, the Court of Appeals, finding no specific statutory authorization for such order, set it aside, declaring:

> The power which the Board now claims is in many ways a drastic one, and in fact more akin to judicial injunctive power than the power which Congress has given some agencies to issue cease and desist orders against conduct deemed in violation of law . . . But the Board is not a court, and cannot rely for its action on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress. See, e.g., Civil Aeronautics Board v. Delta Airlines, 367 U.S. 316, 322, 81 S. Ct. 1611, 6

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injunctions by requiring a showing of irreparable injury and the posting of a security bond or by strictly limiting (e.g., to five days) the duration of the temporary order. NLRB; 29 U.S.C. § 107 (1964). Even absent such a special statutory prerequisite, the exercise of injunctive power by the Federal Courts is prescribed by the requirements of Fed. R. Civ. P. 65, 28 U.S.C.

> L.Ed. 2d 869 (1961); United States v. Seatrain Lines, 329 U.S. 424, 67 S. Ct. 435, 91 L. Ed. 396 (1947); Alaska Airlines v. Civil Aeronautics Board, 103 U.S. App. D.C. 225, 257 F.2d 229 (1958). We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency.

Id. at 880. See also *Standard Airlines, Inc. v. CAB*, 177 F.2d 18 (D.C. Cir. 1949), holding that, in the absence of express statutory authority, the general rule making powers conferred upon the CAB do not permit it to suspend a letter of registration granted an irregular air carrier pending a revocation hearing.

Petitioners attempt to distinguish these cases by reference to *R. A. Holman & Co., Inc. v. SEC*, 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962).[67] In that case the Securities Exchange Commission, by interim order, suspended a broker's right to deal in exempt securities pending a hearing which involved allegations of the broker's prior violation of the Securities Act. Section 3(b) of the Securities Act, 15 U.S.C. § 77c(b) (1964), authorized the SEC to formulate the terms and conditions under which exempt offerings of small issues may be made. Under this provision, the SEC promulgated Regulation A, 17 C.F.R. § 230.251 *et seq.* (1966) which provided that public offerings of $300,000 or less were exempted from the principal registration requirements of the Federal Securi-

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[67] It is also suggested that the decision below conflicts with Amerada Petroleum Corp. v. FPC, 293 F.2d 572 (10th Cir. 1961), *cert. denied*, 368 U.S. 936 (1962). That case involved an interpretation of Section 4 of the Natural Gas Act, 15 U.S.C. § 717c (1964), which requires natural gas companies regulated under the Act to file notices of rate changes with the Federal Power Commission and authorizes that agency to suspend proposed rate changes for a five-month period. The case merely held that the system of rate regulation established by Section 4 operates to prevent a regulated natural gas company from making additional rate changes during a period when prior rate changes relating to the same gas are suspended.

ties laws. Regulation A incorporated SEC Rules 251 to 262. Rule 261, 17 C.F.R. § 230.261 (1966), authorized the Commission to suspend such an exemption temporarily any time it had reason to believe that sales literature contained untrue or misleading statements. Rule 252(e)(2), 17 C.F.R. § 230.252(e)(2)(1966), further provided that no exemption under Regulation A was to be available for the securities of any issuer if any underwriter of such securities was involved in a suspension under Rule 261.

The *Holman* case was not concerned with the power of the SEC to order a temporary suspension of a Regulation A exemption pursuant to Rule 261. The case was concerned with the much narrower question of the validity of Rule 252(e)(2), which removes the availability of Regulation A exemptions from securities whose underwriters are involved in suspension proceedings under Rule 261. As the Court observed:

> The Commission in Rule 252(e)(2) has provided that while a suspension hearing is in progress under Rule 261 . . , [the] 'usual' protective measures [for the securities-purchasing public], rather than the far less protective requirements applicable under Regulation A, shall govern issuance of securities by a party against whom suspension proceedings have been instituted.

299 F.2d at 132. Such action was not only within the SEC's power but was in fact incumbent upon it because of the express Congressional directive contained in Section 3(b) of the Securities Act requiring that, before the SEC exempts a class of securities, it make a finding that the protective provisions of the Act are "not necessary in the public interest and for the protection of investors."

Under the circumstances, the Court felt compelled to conclude that "the Securities and Exchange Commission's interest in protecting the public would seem to outweigh appellant's interest in being able to market small issues of securities without full registration for a temporary period while a hearing is in process." 299 F.2d at 132. More-

over, in upholding the Commission's power to suspend exemptions, the court relied in no small part upon Congress' implied endorsement of this exercise of SEC power. 299 F.2d at 133.

The distinctions between *Holman* and the instant case are manifest. Unlike the instant case, *Holman* involved a person charged with a violation of law. It also involved the suspension of a special privilege or exemption and agency action making the ordinary provisions of the statute applicable. This case involves the suspension of concededly lawful activities and whether the respondents should be treated – not in a preferred – but in a less advantageous manner than others similarly situated. Moreover, in *Holman* the continuation of the special privilege depended upon the ability of the administrative agency to maintain in effect findings which could not be so maintained in the circumstances. No such question is here involved. And in *Holman* there was a clear indication of Congressional approval. In this case the Congressional attitude is clearly adverse to the action taken.

Petitioners attempt two further distinctions of the judicial precedents. First , it is contended (Midwest Br. 47) that *Trans-Pacific* and *Standard Airlines* relate to the withdrawal of agency "authority previously granted . . . essential to the on-going business of private parties" and that "[t]he Commission never authorized the CATV systems." The short answer to this contention is that the Commission did undertake to authorize, govern and regulate the operation of CATV systems, including the responents, and this case involves a withdrawal of that authorization critical to their "on-going business". Second, it is argued that these cases are inapplicable because they deal with a "pending adjudication of an alleged violation." (Gov't Br. 51) We have previously pointed out that, whether or not a violation is alleged, a temporary injunction imposed by an agency pending a hearing to determine whether permanent restraints should be imposed is designed as "an interim measure to assure that the public interest would not be frustrated

pending a full hearing . . ." and that there is no policy reason for imputing to an agency greater authority over persons conceded not to be in violation of a pertinent statute or law than those suspected or accused of a violation.

F. The Relationship Between Rule Making and Adjudication.

Petitioners attempt to justify the restraints here imposed without an evidentiary hearing on somewhat similar grounds. Midwest contends that the Commission could have imposed "a blanket ban" on CATV expansion. (Midwest Br. 51-52) Taking only a slightly less extreme view of the Commission's powers, the Government suggests that the Commission could have prescribed "by general rule a suspension of system expansion pending a hearing in each and every case." (Gov't Br. 49) In support, petitioners rely on *SEC v. Chenery Corp.*, 332 U.S. 184, 202(1943).

Petitioners' argument is based on the cavalier assumption that the hypothesized rule – which in fact was not adopted – would meet all standards of valid agency action when judicially reviewed.[68] Certainly the assumption cannot be accepted in view of the fact that the Commission has not found compelling public interest reasons to impose a freeze upon

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[68] Section 10(e) of the Administrative Procedure Act, as amended, 5 U.S.C. § 706 (Supp. II, 1965-66), provides as follows:

> The reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings and conclusions found to be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; (e) unsupported by substantial evidence in any case subject to the requirements of sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute. . . .

all CATV; and had it done so, such general freeze might well have been challenged and overturned.[69]

What the Government does in this argument is to respond to a complaint of arbitrary action against the CATV respondents in this case by asserting that equally – or possibly even more – arbitrary action could have been imposed by general rule. But even if the Commission had the power to make an arbitrary rule of general application, that fact does not support the argument that it therefore has the power to take arbitrary action on a selected and individual basis against a single system.

Even if it is appropriate in this proceeding to pass upon the validity of a hypothetical rule imposing a general freeze, it is clear that such a rule would not have been valid if it had been issued by the Commission on the day it issued its order in this case.[70] The hypothetical rule would of necessity be required to be founded on a determination that a sufficient threat of general evil existed to warrant a prohibition against expansion by all CATV systems operating in the circumstances presented here. Such a determination could not have been made on the facts available. The whole thrust of the *Second Report and Order* is that it is in the public interest for CATV systems to offer to their subscribers stations whose Grade B signals are available at the location of the system. The Commission affirmatively determined that

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[69] In a closely analogous situation the Court of Appeals for the District of Columbia *en banc* affirmed the Commission's "refusal to institute a 'freeze' on construction permits for VHF stations to prevent competition with existing UHF stations." *Coastal Bend Television Co. v. FCC*, 234 F.2d 686, 690 (D.C. Cir. 1956).

[70] Even if the Commission had imposed a general "freeze", the freeze could not operate to deprive a person whose substantive rights would be permanently impaired of procedural due process i.e., consideration of his claims on the merits. See Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963).

it was desirable for such signals to be carried by CATV systems.[71] The hypothesized rule would therefore have not had the required factual bases.

This case must be decided in the light of what the Commission has done, not in the light of conjecture about what it might have done. In fact the Commission has adopted a rule which reserves to itself the power to impose upon *particular* CATV systems "additional or different requirements" than those contained in the rules generally, but which contains no standards whatsoever for the imposition of those requirements (Section 74.1109(a)) and leaves open to the Commission the procedures it will follow in imposing the "additional or different" requirements (Section 74.1109(f)). The Commission has, therefore, adopted a "rule" which in substance says certain CATV operations will be governed by such considerations as the Commission considers appropriate and by such procedures, including injunctions issued without hearing or argument, as it may choose to adopt in each particular case. The issue in this case is the validity of an injunction issued pursuant to a claim of unbridled authority in the guise of a "rule". This explicit rejection of the mandate of the Administrative Procedure Act and elementary principles of due process cannot be justified.

G. Judicial Standards for Injunctive Relief

The claimed authority to issue the order involved herein is fairly tested against judicial standards for injunctive relief. The order imposing the injunction (i.e., order for temporary relief) was issued on July 20, 1966. Its duration was fixed as "pending the outcome of this proceeding." (App. 174-75) The Commission admittedly "did not hold an evidentiary hearing" in connection with the issuance of the injunction (Midwest Br. 50), for the order was issued "pending an evi-

[71] In a succession of detailed findings and conclusions in the Second Report and Order, the Commission set out the affirmative public benefits flowing from CATV operations generally and Grade B carriage in particular. (App. 69, 71, 87, 105, 107, 112)

dentiary hearing." (Gov't Br. 52) Nor was oral argument permitted. The injunction has now been in effect for over a year and a half, and the Government has advised this Court that is it likely to remain in effect for approximately two years.

No federal court would have imposed a restraining order of such unusual duration without an evidentiary hearing and oral argument. Under the Federal Rules of Civil Procedure significant and short time limitations are imposed with respect to the comparatively extraordinary remedy of a temporary restraining order, those rules being designed to limit its impact to ten days except in unusual circumstances. Fed. R. Civ. P. 65(b), 28 U.S.C. The action taken by the Commission in this case is similar to a preliminary injunction the function of which is, "in general, to preserve the status quo pending a trial on the merits". 7 J. Moore, Federal Practice ¶ 65.04[3], p. 1641 (2d ed. 1966). However, an evidentiary hearing is required before a temporary injunction is issued. *Ibid.*

Moreover, the purpose of an injunction is to prevent irreparable injury and it is not issued on the basis of mere apprehension of injury. See *Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932). The only injury here apprehended by the Commission was that, unless the injunction was issued, the respondents could wire up new subscribers and the Commission considers it to be impractical to withdraw service once established. (App. 116) The Commission in this connection advised the Ninth Circuit as follows:

> While such addition of new subscribers would not by itself cause any immediate public harm in terms of competitive effect upon the service of the local television stations, it would constitute exactly the sort of entrenchment which the Commission is trying to avoid. For it would mean additional disruption to the public in the event it is determined in the hearing to be held

that CATV systems in San Diego should not be permitted to bring in Los Angeles signals.[72]

However, if it is ultimately determined the Commission has jurisdiction over CATV and it ultimately determines to limit further expansion of CATV service by the respondents or to cut such service back, it may simply do so by order. No technical problem would be involved in effectuating such an order. The only problem involved would be possible dissatisfaction with the Commission's action by subscribers to the respondents systems who might then be deprived of access to Los Angeles signals, and the likelihood that such subscribers would voice their dissatisfaction. While such a situation might cause the Commission discomfort, it is hardly a ground for determining that there exists a danger of irreparable injury which justifies injunctive action.

Finally, the temporary injunction issued against the respondents has been in effect for more than a year and a half; an evidentiary hearing has since been held; and an initial decision has been reached in which it was concluded that respondents' operations have not "had any effect whatsoever on the service offered by the San Diego television stations"; and that " . . . the evidence on this record furnishes no basis for the imposition of any restrictions on the present or future operation of CATV systems in the San Diego market." *Supra*, p. 14. However, the Government has advised this Court that final Commission review of the initial decision is not likely to be completed until the end of this Term.

Thus, for the first time since this proceeding was initiated, the evidence has been heard and the trier of fact has concluded the injury feared by the Commission is not likely to occur. In the light of these events the petitioners' contention is not limited to sustaining the power of the Com-

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[72] Respondents' Motion for Reconsideration of Stay Order and Opposition to Motion To Stay at 14, Southwestern Cable Co. v. United States, 375 F.2d 118 (9th Cir. 1967).

mission to have issued the temporary injunction at the outset and without an evidentiary proceeding. The full scope of the petitioners' position is far more sweeping. It assumes, first, that the Commission may issue a preliminary injunction without an evidentiary proceeding, that the injunction may restrain services which are wholly legal under the Commission's rules and the local franchise; and that the injunction may deprive residents of San Diego of valuable news and other services authorized by a franchise from the City. It also assumes that the administrative injunction may be retained in effect for a period admittedly likely to approximate two years in the face of a subsequent judicial decision holding that it imposes substantial hardship on the respondents and a subsequent determination by the only trier of the evidence presented in the only evidentiary proceeding held that the purposes for which the injunction was initially issued will not be served by its continuance in effect.[73] Such patently arbitrary consequences demonstrate the reasons for the caution displayed by Congress in conferring any injunctive powers upon administrative agencies and for its insistence by explicit provisions upon the observance of procedural due process *prior* to the exercise of the power in the limited and selected situations where it is conferred.

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[73] In similar circumstances, it is evident that a court would dissolve a temporary injunction previously issued. See Two Guys From Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Guillory v. Adm'rs of Tulane Univ., 306 F.2d 489 (5th Cir. 1962).

CONCLUSION

For the foregoing reasons, it is urged that the judgment of the Court below be affirmed.

Respectfully submitted,

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